ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 205554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253

COMMENTS OF UNITED STATES WIRELESS CABLE, INC.

January 23, 1995

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SUMMARY OF COMMENTS

1. Open a filing window that is open to actual operators of wireless cable systems so that they can complete the channel complements for their systems. Actual operators generally are **lessees** of ITFS channels and of MDS/MMDS channels. The existing licensees of MDS/MMDS channels generally are speculative lottery winners of leased or dark facilities, are not operators and should not be qualified for the filing window.

2. Take steps to stop the warehousing of unused MDS/MMDS channels licensed to speculative lottery winners. Establish a finder's preference for MDS/MMDS channels that are unconstructed or dark and award the licenses promptly to actual operators who find and report such violations. Require MDS/MMDS stations to be operating, not just operational.

3. Streamline the processing of new MDS/MMDS applications and major modification applications. Set timetables for processing new ITFS and MDS/MMDS applications and modification applications. Shorten the 120 public notice period for MDS/MMDS modifications to 30 days, eliminate mail service, and exclude lottery losers. Require detailed ownership information from new MDS/MMDS applicants, especially if bidding preferences are used, to avoid post-facto litigation over fraudulent preference claims.

COMMENTS OF UNITED STATES WIRELESS CABLE, INC.

United States Wireless Cable, Inc. ("USWC"), through counsel and pursuant to the Commission's Notice of Proposed Rulemaking (the "NPRM"), hereby respectfully submits its Comments, and in support hereof respectfully shows as follows:

I. Commenter's Interest

USWC is the parent company of United States Wireless Systems, Inc., the operator of wireless cable systems serving Lubbock and Victoria, Texas, with additional markets in the process of being launched. USWC supports the efforts of the Commission to speed the availability of additional channel capacity to wireless cable operators. The Commission is correct that the delays in assembling the 32 possible wireless cable channels in each market make it extremely difficult for wireless cable operators to compete against wired cable operators, and now also DBS multi-channel wireless video service.

As an example of the difficulties of one operator, USWC, in one market, Lubbock, Texas, consider that USWC is operating with only 16 leased ITFS channels because:

1. The remaining 4 out of 20 possible ITFS channels in Lubbock have not been licensed. Two competing ITFS applications, both local, accredited school districts, were filed for these 4 channels on October 1, 1990, and January 14, 1991, respectively, and have been pending for four years. No timetables exist for processing ITFS applications. During this four years, DBS service has been authorized and launched, offering a wireless

multi-channel video service that competes directly with terrestrial wireless cable service.

2. All 12 of the commercial MDS/MMDS channels in Lubbock have been licensed and certified as having been constructed, yet none of these channels is being used to provide service to the public. One of the two MMDS channel groups, the E Group, has been certified as constructed, but to the best of USWC's knowledge has been and remains dark. This situation exists because the licensees who hold these channels are permitted to warehouse their channels by a Commission rule that requires only that their stations be "operational", rather than actually "operating", or allows them to broadcast color bars indefinitely with no subscribers actually receiving service.

In the meantime, USWC, the only wireless cable operator actually operating in this market, must attempt to compete against the local wired cable company, who has 35 channels and can add channel capacity anytime it wants without having to file or process any application with the Commission, and now also against the direct broadcast satellite service that is offering a wireless, multi-channel video service with many more channels.

II. <u>What The Commission Needs To Do</u>.

The NPRM indicates that the Commission is concerned about the time it takes for wireless cable operators to assemble channel capacity, NPRM, para. 2, and the speculation in wireless cable applications that contributed to these licensing delays, NPRM, para. 4. If these are the Commission's concerns, then it

should be crystal clear from the example set forth in Part I of these Comments, among many similar cases throughout the industry, that the Commission should do three things:

1. Open a filing window for MMDS channels that is open only to actual operators of wireless cable systems within each designated area. In most cases the actual operator is a lessee of ITFS and MDS/MMDS channels. Lessee-operators should be qualified for this window. In many cases existing MDS/MMDS licensees are speculative lottery winners who are not operating a wireless cable system and should be excluded from bidding.

2. Take decisive steps to stop the warehousing of previously authorized MDS/MMDS channels. The Commission should establish a finder's preference for wireless cable operators who report unconstructed, dark, and unused MDS/MMDS channels in their areas. The Commission should cancel these unused authorizations and make the channels available to the finder/operator. The rules should be amended to require that MDS/MMDS stations be operating, not just operational.

3. Streamline the Commission's processing of new ITFS and MMDS/MDS applications and modification applications. Establish processing timetables for ITFS and MDS/MMDS new and modification applications. Shorten the unprecedented public notice periods for MDS/MMDS modification applications and eliminate burdensome and time-consuming service requirements. Require detailed information on new MDS/MMDS auction applicants to avoid litigation over preferences.

These three steps will promote a viable wireless cable industry. Without them, the Commission's action herein will further delay and impede the assemblage of 32 channels into viable wireless cable systems and wireless cable will continue to offer less than effective competition to wired cable and DBS.

A. Open A Filing Window For Actual Operators To Complete Their Channel Complements.

There really are only 32 available wireless cable channels in most markets, the 20 ITFS channels (Groups A, B, C, D and G), the 8 MMDS channels (Groups E and F) and the four single MDS channels (MDS1, H1, H2 and H3). In most markets an MDS2 channel does not exist. In markets that have an MDS2 channel, it often is an MDS2A, which indicates that its is only 4 MHz (the other ITFS and MDS/MMDS channels are all 6 MHz).

1. Lessees Of ITFS Channels Who Are Operating A Wireless Cable System Should Be Qualified For The First Filing Window.

Because 20 of the 32 possible channels are ITFS channels, the wireless cable operator frequently is a lessee of ITFS channels. The Commission suggests opening a filing window for those who can demonstrate that they are "operating a minimum number of channels...." But the Commission fails to state explicitly that the filing window would be open to the lessees of ITFS channels, as well as MDS/MMDS channels. NPRM, para. 14.

The Commission should make it clear that lessees of ITFS channels operating a wireless cable system will be qualified for the initial filing window. USWC and other wireless cable operators have invested substantial sums to launch wireless cable

systems using leased ITFS channels. Lessees of ITFS channels should be qualified to bid in an initial filing window for vacant MDS/MMDS channels to complete these systems.

The licensees of ITFS channels are schools, colleges and universities who are not commercial wireless cable operators and are unlikely to bid in an auction for commercial channels. The lessees of ITFS channels are the actual wireless cable operators. Thus, in order to help wireless cable operators fill-in their channel complements, lessees of ITFS channels who are actual wireless cable operators should qualify to apply for vacant MDS/MMDS channels in the market.

2. Lessees of MDS/MMDS Channels Who Are Operating A Wireless Cable System Should Be Qualified For The First Filing Window.

The NPRM suggests that existing MDS/MMDS licensees should automatically be qualified for the first filing window, but that lessees of MDS/MMDS channels would have to make a special showing to qualify for an initial filing window. NPRM, para. 14. However, the actual wireless cable operators for the most part are lessees, not licensees of MDS/MMDS channels.

The licensees of MMDS channel groups E and F, and MDS channels MDS1 and H1, H2, and H3 frequently are speculative lottery winners or middle men who have bought or leased the station from the original lottery winner in the hopes of selling or leasing it for a profit to an actual operator. The Commission can best help actual operators if it permits lessees of MDS/MMDS

channels who are actually operating a wireless cable service to apply for vacant channels in their areas.

3. **Existing MDS/MMDS Licensees Who Are Not Operators Of A Wireless Cable System Should Be Excluded From The Filing Window.**

Permitting speculators from a 1983 lottery to qualify to buy more channels at auction, because they won an earlier lottery, would lead to further serious abuse of the Commission's processes and seriously delay and impede the development of an industry that is facing an explosion of wireless video competition from DBS. Existing MDS/MMDS licensees should be excluded from applying for additional channels, except where the licensee can certify that it is the actual operator of a wireless cable system, and not merely the licensee of channels that are leased to an operator or have been left dormant in a dark facility.

Most of the existing MDS/MMDS license holders are unable and/or unwilling to make the kind of investment necessary to launch a competitive wireless cable system, i.e., to lease an office, to hire staff, to advertise and promote, to obtain program contracts and pay program fees, to buy and install subscriber boxes, to provide service and to bill and collect fees.

At the tune of $200-300 per subscriber for subscriber antennas and decoders, it costs $200,000-$300,000 to sign on 1,000 subscribers, a minuscule number of subscribers by wired cable standards. Signing on 10,000 subscribers takes $2-3

million dollars worth of subscriber equipment. Those who filed lottery ticket applications for MDS/MMDS channels had and have no ability or intention to make such investments. To automatically qualify all existing licensees to bid in an initial filing window will lead to further serious abuses of the Commission's processes and litigation that will delay new service.

B. The Commission Should Take Steps To Stop The Warehousing Of MDS Channels By Establishing A Finder's Preference For Reporting Unconstructed Or Unused MDS/MMDS Channels, And By Requiring MDS/MMDS Stations To Be Operating, Not Just Operational.

While the Commission takes steps to award licenses for vacant MDS/MMDS channels, the quickest way to benefit the industry would be to adopt measures to ensure the immediate use of the channels that already have been licensed. No matter how efficient the new auction process, making effective use of the dark and unused channels already authorized is the quickest way to help wireless cable become more competitive.

1. Establish A Finder's Preference For Reporting Dark MDS/MMDS Stations And Award The Licenses Promptly To The Finder.

In the SMR area the Commission has adopted a finder's preference to reward those who report warehoused, unused spectrum. The Commission should adopt a finder's preference rule for unused MDS/MMDS channels. Many MDS/MMDS channels, though certified as constructed, are dark or are broadcasting only color bars, while the speculative holders of such licenses or lease rights are attempting to broker them for higher prices to actual wireless cable operators. Such warehousing should be stopped by

instituting a finder's preference so that wireless cable operators can report unconstructed or dark stations and those broadcasting only color bars in their service areas and obtain the channels to increase their systems to 32 channels.

2. Require MDS/MMDS Stations To Be Operating, Not Just Operational.

Section 21.44(a)(3) of the Commission's Rules has been and continues to be widely interpreted to permit MDS stations to remain off the air indefinitely so long as the station allegedly is capable of transmitting. Specifically, the term "operational" is being interpreted to mean capable of transmitting rather than actually transmitting.

It is difficult or impossible for any petitioner to prove that an MDS station is not capable of transmitting. Proof that the station is dark is rebuffed under the widespread rule interpretation with the allegation that the station, though dark, is capable of transmitting and therefore is operational, although not operating.

The protested interpretation of Section 21.44(a)(3) has led to a lax attitude toward the construction of MDS facilities. Such facilities may be constructed, tested and shut down. They then remain off the air indefinitely, with the petitioner being unable to access a locked transmitter room to determine if equipment is still on site. Allegations that MDS equipment is removed after testing are difficult to prove since the petitioner generally has no right to enter the transmitter property.

Section 21.303(d) of the Rules provides that if an MDS station remains dormant and does not serve the public for a year, the license is forfeited. But USWC is unaware of a single instance in which this rule has been applied, despite the prolonged dormancy of many alleged MDS stations.

While the Commission adopted what it thought was a strict one year construction deadline for MDS in Part 21, Sections 21.43 and 21.44(a)(1), once a certification of construction is filed by an MDS conditional licensee, the MDS channel(s) can be warehoused while the licensee or lessee holds out for the most lucrative deal from a wireless cable operator.

Such long term warehousing has not been tolerated in the radio and television services under Part 73 of the Rules. Radio and television stations that are off the air for more than 30 days are required to file for an STA to remain dark under Part 73, Section 73.1735(a)(4) and are subject to continued reporting and license cancellation for failure to return to the air.

C. Streamline The Processing Of New MDS/MMDS and ITFS Applications And Modification Applications.

Instituting a computerized system for filing ITFS and MDS/MMDS applications will not help the industry unless the Commission reforms the processing of the applications once they are filed. Use of an auction for new MDS/MMDS applications will not solve all processing problems because ITFS applications will not be auctioned and they constitute 20 out of 32 possible wireless cable channels, and because modification applications

also will not be handled by auction and are critically important to co-locate ITFS and MDS/MMDS channels.

1. Establish Timetables For Processing Applications For New Facilities And Modification Applications.

Computerized filing of ITFS and MDS/MMDS applications will be a useless gesture toward efficiency if the processing of the applications, once filed, remains inefficient. Timetables need to be set and adhered to for the processing of ITFS and MDS/MMDS applications.

How the Commission processes new ITFS applications and modification applications is critically important because the ITFS channels comprise 20 out of 32 possible channels. The need for a processing timetable for ITFS applications is critical. Two contested ITFS applications for the same channel group lead to a decision being drafted by a staff attorney in the Distribution Services Branch that is then approved by the Chief of Distribution Services. Next, the decision is reviewed by the Video Services Division and then approved by the Chief of the Video Services Division. Next, the decision is reviewed and approved by the Chief of the Mass Media Bureau. Next the decision goes to the Commission staff for review and circulation.

All of these layers of review may be useful where comparative cases are not being decided by an ALJ, but if so, timetables need to be set and adhered to. The Private Radio Bureau has implemented the use of processing timetables and they also should be adopted for new ITFS and MDS/MMDS applications, and for modification applications.

2. Public Notice Periods and Service Requirements For MDS/MMDS Modification Applications Need To Be Reformed.

The Commission recognizes that a wireless cable operator needs to assemble as many of the 32 possible wireless cable channels as possible to create a competitive system, but the NPRM does not demonstrate an appreciation of the critical importance of modification applications in the assembly of channels into a wireless cable system.

Wireless cable is a line-of-sight service. Yet there can be as many as 11 different licensees in a market, since there are five ITFS channel groups, the two MMDS channel groups and four single MDS channels. Frequently the stations are licensed at more than one site and have to be co-located through modification applications. No operator can afford to place multiple antennas on thousands of subscribers' roofs pointing in different directions. For interference reasons also, to eliminate adjacent channel interference between the various ITFS and MDS/MMDS channels in the market, as many of the 32 channels as possible must be co-located.

Speedy processing of new license applications standing alone will not help wireless cable operators unless it is accompanied by speedy processing of modification applications. Yet the rules applicable to an MDS/MMDS modification application to relocate the transmitter site, 47 C.F.R. §21.902(c), contain an unprecedented requirement of a 120 day public notice period. 47 C.F.R. §21.902(i)(50 and (6). The Commission adopted a 60 day

A cut-off period for new ITFS applicants in recognition of their status as non-commercial entities, twice the normal 30 day period. But delaying action on MDS/MMDS modifications for 120 days, i.e., four months, means that it can take a wireless cable operator a year or more to co-locate an MDS/MMDS station, and until it is co-located, it cannot be effectively used in the system.

The Rules also require that an application to re-locate an MDS/MMDS station be served by certified mail upon MDS/MMDS applicants, permittees and licensees, 47 C.F.R. §21.902(g), and upon ITFS stations and permittees, 47 C.F.R. §21.902(i), despite the fact that the application to re-locate will appear on a Public Notice, like other FCC applications.

MDS/MMDS modification applications to re-locate transmitter sites are required to show non-interference, not only to other MDS/MMDS permittees and licensees, but also to MDS/MMDS applicants. 47 C.F.R. §21.902(g). The MDS/MMDS applicants frequently include scores of lottery losers, who remain in the data base because the application of the tentative selectee has been tied up in litigation for years. In the meantime, a wireless cable operator seeking to re-locate a transmitter site under Section 21.902(c) of the Rules must protect all of the lottery losers, spending substantial sums on engineering studies to prove non-interference, copying what are often lengthy applications and mailing them by certified mail, rather than putting the money into the system itself. An electronic filing

system is hardly helpful if paper copies have to be served on scores of parties by certified mail in order to commence a four month long time period for petitions to deny.

Public notice periods should be shortened to 30 days, service requirements should be eliminated, a Public Notice is a public notice and should be treated as such, and lottery losers should not have protection rights unless and until they become the tentative selectee.

3. Require Detailed Ownership Information From New MDS/MMDS Applicants Who Will Bid In Any Auction With Preferences.

The Commission suggests a short form application for new MDS/MMDS applicants, with more detailed information to be filed only by the auction high bidder. USWC fully supports the position of Hardin & Associates, Inc., consulting engineers, that detailed engineering information is needed and that a national window should be used, rather than arbitrary areas that do not conform to the existing systems where companies like USWC have made substantial investments.

Detailed information also should be required concerning the ownership of the applicant, especially where any system of bidding preferences is used. Otherwise, abuses will occur and the award of the licenses will became bogged down in litigation.

III. Conclusion

USWC supports the efforts of the Commission to speed the implementation of wireless cable service to more communities. This requires that the Commission find a way to get licenses into the hands of actual operators and enable them to modify the licenses to co-locate the stations in order to integrate them into a 32 channel system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Magdalene E. Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 23rd day of January, 1994, served by hand delivery, a copy of the foregoing "Comments of United States Wireless Cable, Inc." to:

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